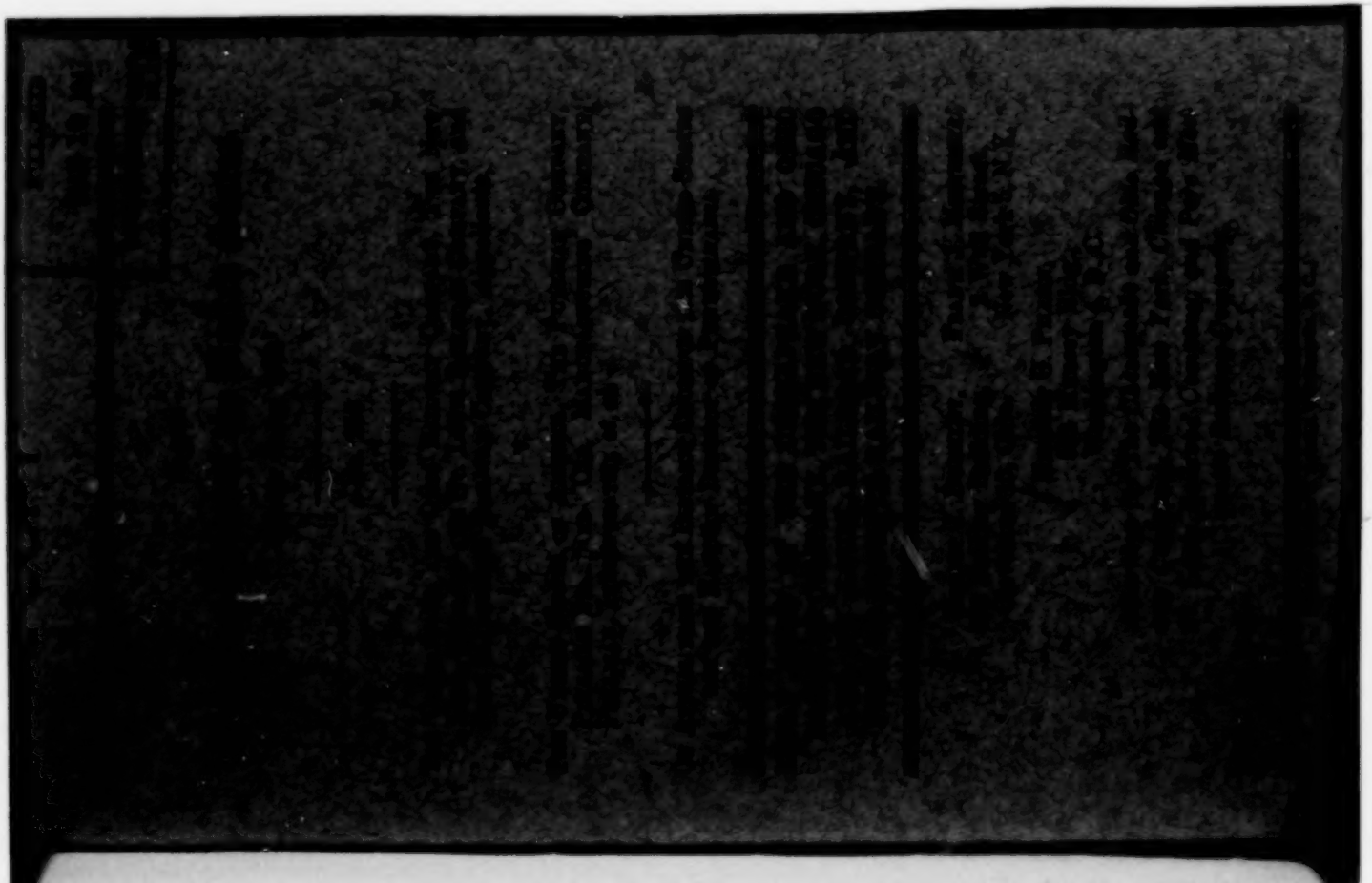

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IN THE

Supreme Court of the United States

October Term, 1946

No. 255

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, and PERE MARQUETTE RAILWAY COMPANY, *Appellants*,

v.

THE UNITED STATES OF AMERICA, THE PULLMAN COMPANY, PULLMAN-STANDARD CAR MANUFACTURING COMPANY, PULLMAN, INCORPORATED, *et al.*

REPLY BRIEF OF THE CHESAPEAKE AND OHIO RAILWAY COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, AND PERE MARQUETTE RAILWAY COMPANY.

OPENING STATEMENT.

Briefs filed herein by the Pullman Group and by the Railroad Buying Group advance the extraordinary contention that this Court is to be relieved of consideration of the question as to whether the order of the lower court was adequate to terminate an adjudicated and condemned monopoly, because, as they say, the filing by the Buying Group of a so-called pooling application makes this an "administrative" question as to which the Interstate Commerce Commission has primary jurisdiction.

The proceedings before the Commission have been instituted since the action of the District Court and are no part of the record of this case and have no legitimate bearing upon it. However, since the above mentioned contentions are made we feel a duty to reply by brief. In addition to our reply we shall append to our brief certain excerpts from the hearings before the Commission Examiners, which substantiate our arguments relating to the difficulties attendant upon the effort of the District Court to dissolve improperly interlocking relationships.

ARGUMENT.

Pendency of Proceedings Before the Interstate Commerce[1] Commission Does Not Relieve this Court of Jurisdiction.

If the Railroad Buying Group presented for the Interstate Commerce Commission's approval a genuine pooling agreement within heretofore accepted definitions of pooling, which we contend they did not;

And if the Commission had jurisdiction to approve an acquisition as being an incidental but integral part of a pooling of business not owned by the applicants, which we contend it has not;

And if the Commission had jurisdiction to approve any acquisition whatever under Section 5(1) of the Commerce Act, which we contend it has not;

And if the requirement of Section 5(1) of the Commerce Act, that an approval must be accompanied by a finding that the proposed transaction will not unduly restrain competition, can be legally so distorted as to permit the Commission to find that a monopoly, found by the court and admitted by the culprit to be complete, is not an undue restraint of competition, which we contend it can not;

And if the Commission should assume such jurisdiction and make such finding;

And if the Courts should sustain the Commission in so doing;

---

[1] The provisions of the Interstate Commerce Act here discussed are contained in Appendix A hereto.

Then only would it be possible that under the plenary power granted to the Commission under Section 5(11) of the Commerce Act the transaction proposed herein might be validated and exempted from the operation of the antitrust laws, notwithstanding any order this Court might make in these proceedings; and in that case such order by the Commission might even be so broad as to sweep away all the injunctive relief granted herein by the District Court, on the ground that such injunctions are mere efforts to enforce antitrust laws which would no longer be applicable, having been superseded by an order of the Commission.

The Railroad Buying Group Proposes Continuing a Monopoly and Seeks to Justify Monopolization Condemned by the Sherman Act.

The present proceeding is unique among the antitrust cases in that it is here proposed that a subsidiary company which has achieved a complete monopoly in its field shall be passed along to a new ownership with all of its monopolistic strength intact. True, the lower court has enjoined this monopoly from making exclusive operating contracts with its customers but in lieu of that element of monopolistic strength it has provided that all of the company's customers, indeed, all of its possible customers, shall be its stockholders.

It is indeed difficult to deny that such a company will have monopolistic powers which are in violation of the provisions of the Sherman Act. No denial is seriously made and in fact the Buying Group's brief (pp. 31 et seq.) admits the urge that the railroads will have to do business with their own company. Though it is inconceivable that a competitive concessionaire can exist under the circumstances, the Buying Group solemnly emphasizes the legal right of each individual railroad to do business with any such concessionaire if he should turn up. This seems to be the same empty legal right they have had during all the years that the Pullman monopoly has existed.

The Buying Group stresses the point that since a sleeping car concessionaire can operate only over lines that belong to some railroad or other, therefore no one has a right to go into such business in competition with the Railroads. What we contend, of course, is not that a prospective concessionaire has a right to intrude itself on any railroad; we contend only that the unification of the railroads to accomplish the exclusion of concessionaire competition [which this Buying Group takes as a matter of course], is a violation of the antitrust laws, and this, or any such monopoly, must, under the law, be effectively prevented, so that the opportunity may be left open for a free enterpriser to offer sleeping car service to the individual railroads, each acting independently. In respect to this subject the Railroad Buying Group has been quick to adopt a fallacy enunciated by the District Court to the effect that the railroads as a group owe an obligation to the public to provide sleeping car service. As if the Boston & Maine might be chargeable with deficient sleeping car service on the Florida East Coast. There is, of course, no such common obligation. Each railroad owes its obligation to its public on its own lines and has a right to make reasonable agreements with connecting railroads, but a combination of all railroads to exclude all concessionaires is a stifling of competition that is prohibited by law.

How then shall the Railroad Buying Group justify its position here? First it wants this Court to disregard the policy of free competition established by the Sherman Act because, according to their view, their plan is a constructive agreement which in their opinion will give good service to the public. This is the classic monopoly argument. They try to make this nationwide monopoly appear beneficent by showing that from time to time in the past railroads have operated certain jointly owned facilities of a local character in the interest of better service to the public, and have not thereby been convicted of violation of antitrust laws. The analogy does not apply.

The Railroad Buying Group Proposes Continuing a Monopoly and Seeks Exemption from the Antitrust Laws.

But counsel for the Buying Group realize that the antitrust laws condemn the monopolization of trade and commerce and do not admit exceptions in favor of what some group may believe to be beneficent monopolies. It is therefore important to this Group to secure a clear exemption from all antitrust laws. Hence the application of the Railroad Buying Group to the Interstate Commerce Commission for approval of a so-called pooling agreement which they believe will exempt this proposed monopoly from the operation of the antitrust laws by treating it as an "administrative" problem under the exclusive jurisdiction of the Interstate Commerce Commission.

And so the Railroad Buying Group has now put its major reliance on a matter which is no part of this record, and possibly should not be mentioned here at all. We are asking this Court to enforce the antitrust laws as they apply to the record in this case. Our opponents are suggesting to this Court that it should not act at all, because they think they see a method of exempting the whole proposed transaction from the application of the antitrust laws.

Section 5(1) of the Commerce Act makes unlawful certain pooling agreements among carriers except as specifically authorized by the Interstate Commerce Commission. It concerns agreements of a temporary character relating to the pooling of business as to which carriers might otherwise be in competition and provides among other things that in authorizing such an agreement the Commission must find that the proposed agreement will not unduly restrain competition.

Section 5(2) of the same Act provides for consolidations and acquisitions of control among carriers. Its obvious intent is to authorize the Commission to pass upon changes in ownership having a permanent character.

Section 5(13) of the same Act contains a special definition of the word carrier as used in Section 5(2) and certain

other paragraphs, so that a sleeping car company, although subject to the provisions of Section 5(1), is not within the jurisdiction of the Commission under Section 5(2).

Section 5(11) of the same Act provides that with respect to any authority exercised by the Interstate Commerce Commission pursuant to any of the provisions of Section 5 its orders shall not be limited by antitrust laws.

It is clear that within the limited scope of authority granted by the Congress to the Commission under Section 5, the Commission may make orders inconsistent with antitrust laws, and to the extent of such inconsistency the antitrust laws are superseded. Had the law provided that a sleeping car company was a carrier within the meaning of Section 5(2) and had an application been made thereunder for its acquisition by the Buying Group the Commission would have set a hearing with certain prescribed formalities, including, among other things, notices to the Governors of all the States, and if at the hearing it had been found that the statutory standards had been met, then, with due regard to the antitrust policy of the nation,* the Commission might have entered an order authorizing the acquisition of Pullman by the Railroad Buying Group and that order would have made it possible for the Buying Group to acquire Pullman, not because the purchase would be permitted under the Sherman Act, but because under the provisions of Section 5(11) the Sherman Act and all antitrust laws would be set aside by the proper order of the Commission.

But that course was not open to the Railroad Buying Group because the Congress, presumably for good reasons, did not include within the jurisdiction of the Commission under Section 5(2) authority to approve the acquisition of a sleeping car company.

Counsel have very ingeniously sought to circumvent this disability by the pretense that the acquisition of Pullman, which could not be authorized by the Commission under the paragraph providing for acquisitions could, neverthe-

*Georgia v. Pennsylvania Railroad Co., 324 U. S. 439, 456.

less, be authorized by the Commission as an "administrative" matter,—as a mere incident to a temporary pooling agreement under the much more informal provisions of Section 5(1).

So the Buying Group made an application under Section 5(1), not for a pooling of existing business of the railroads with respect to which they were presently more or less in competition, which is the type of pooling contemplated by the paragraph, but rather they applied for authority to pool a business which they had never operated and did not own, and then had the temerity to contend that since they did not own it the acquisition of it becomes a part of the pooling [because without acquisition there could be no pooling], and thus a Commission approval of pooling becomes an approval of acquisition, and so in this incidental manner the antitrust laws are to be by-passed and consequently the courts are to be ousted of jurisdiction in this case.

"The Administrative Phase of the Case."

Since the Railroad Buying Group contend that their filing of a so-called pooling application before the Interstate Commerce Commission may result in an "administrative" finding which will justify their acquisition of the Pullman stock and possibly exempt the whole transaction from the operation of the antitrust laws, this Court should be interested in knowing how this problem of acquisition of Pullman stock was presented to the Interstate Commerce Commission.

The application for authority to buy the Pullman stock is contained in the following prayer:

WHEREFORE, Applicants respectfully pray that the Commission find that all pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof, provided for in said Memorandum Agreement of October 18, 1945, and the Supplement thereto of November 20, 1945, and in the leases and operating contracts to be made pursuant thereto, coupled with the proposed acquisition and

ownership by the Railroads of the capital stock of The Pullman Company, will be in the interest of better service to the public and of economy of operation, and will not unduly restrain competition, and that the Commission by order specifically approve and authorize the making of said agreements and leases and the taking by the Applicants of all steps necessary or appropriate to carry the same into effect."

At the outset of the hearing before the Interstate Commerce Examiners appellants herein moved to clarify the issues. The Examiners did not rule thereon nor did the Buying Group choose to make clear whether they sought approval of the proposed stock acquisition. In fact neither the Buying Group nor the Examiners considered that the acquisition came within the scope of Section 5(2) of the Act and at the hearing the Buying Group argued and the Examiners found that it did not, and that it was not necessary for the Buying Group to secure Commission approval so far as the acquisition of Pullman is concerned.

However, since the Buying Group obviously could not pool what they did not own, there could be no pooling as proposed unless the Buying Group should first acquire Pullman, and from this premise the Examiners have concluded that: "the proposed railroad ownership of the Pullman stock would be a circumstance of outstanding importance which would make the proposed arrangement a pooling."

The Examiners then concluded that since the acquisition must be made in order for the Buying Group to present a proposal for pooling, the Commission somehow gains jurisdiction to approve the acquisition under Section 5(1); that is, the Commission gains authority to approve an acquisition which it would otherwise have no jurisdiction to approve, because such acquisition is necessary in order for the Buying Group to have something to pool.

The Buying Group state that they "applied to the Commission for authority under Section 5(1) of the Interstate

Commerce Act to carry out the 'proposed transaction'." What proposed transaction do they refer to? The answer is found on page 11 of their brief,—"approval of the pooling of revenues and services." The Buying Group brief then draws the conclusion that the issues pending before the Commission are identical with those issues raised by these appeals, to wit: "That the acquisition and operation of Pullman's sleeping car business by appellee railroads would result in restraint of competition and monopoly violative of the antitrust law," and "that the court should have considered which of the proposals for purchase of the sleeping car business would result in the best method of conducting such business for the benefit of the public at large." (Appellee Railroads' Brief, p. 13)

Obviously Section 5(1) neither requires nor authorizes findings on these subjects.

At the hearing before the Interstate Commerce Commission Examiners, counsel for the Railroad Buying Group said that the acquisition of the Pullman stock was only indirectly involved in their application, and refused to disclose what rights they would claim if the application were granted. We attach hereto, as Appendix B, excerpts from the hearing showing these statements of counsel.

The Question of Complete and Perpetual Separation.

In our principal brief, at pages 16 to 20, we discussed the requirement of the District Court judgment of May 8, 1944, concerning the complete and perpetual separation of ownership and control of the sleeping car business and of the manufacturing business. We called attention to the Court's mention of Richard K. Mellon personally and his connections with Pullman Incorporated on the one hand and the Pennsylvania Railroad on the other. We tried to show that while a sale of the Pullman Company stock to interests plainly independent of the Pullman Incorporated group would accomplish such a separation, it cannot be accomplished by entering orders about interlocking directorates without regard to the more fundamental aspects of owner-

ship and control. Since we now feel free to make full use of the record in the Interstate Commerce Commission application referred to by the Railroad Buying Group, we attach hereto, as Appendix C, certain excerpts from the transcript of hearing on that application showing the actual results which followed from the District Court's orders relating to interlocking directors. It will be seen that this sincere inadequate effort on the part of the District Court has actually resulted in an increase of Mellon control over Pullman Incorporated, while Richard K. Mellon remains a director and substantial stockholder of the Pennsylvania Railroad, the leading member of the Railroad Buying Group.

Respectfully submitted,

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APPENDIX A.

ADDITIONAL STATUTE DISCUSSED.

U. S. Code, title 49, Sec. 5.

Sec. 5 (1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part, part II, or part III to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, or their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further*, That any contract, agreement, or combination to which any common carrier by water subject to part III is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on the date this paragraph as amended takes effect, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest

of better service to the public or of economy in operation, or that it will unduly restrain competition.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for

public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * * * * * * * * *

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a

majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

(13) As used in paragraphs (2) to (12), inclusive, the term "carrier" means a carrier by railroad and an express company, subject to this part; a motor carrier subject to part II; and a water carrier subject to part III.

* * * * * * * * * *

APPENDIX B.

Colloquy at Pages 13 and 14 of Transcript, I. C. C. Proceedings.

Mr. Bulkley: May I at this time ask counsel for applicants a couple of questions to clarify our issues here?

Exam. Hosmer: Certainly.

Mr. Bulkley: I would like to know, turning to page 7 of the printed copy of the application, what is meant in the last sentence of section 12 where it says:

> "The determination of these issues, some of which are also involved in the appeal now pending in the Supreme Court of the United States"

and so forth.

Will counsel state what issues he has in mind that are also pending in the Supreme Court?

Mr. Prince: We had anticipated at some proper period in the hearing to introduce the appeal paper of the Government and of Otis & Company and of the C&O group to show what was involved in the appeal and from that we proposed to argue that those very same issues are here before the Commission in so far as the pooling is concerned, and in so far as the fact exists that there is no undue restraint of competition.

Mr. Bulkley: Does counsel regard that the question of authorization of the acquisition of the stock by the applicant is involved here?

Mr. Prince: It is only indirectly involved in that it is a part of the same transaction. We recognize that the acquisition of the stock under Section 5(2) is not a matter that the Commission, in our judgment, has jurisdiction over.

Mr. Bulkley: May I understand counsel that it is not contended that anything in these proceedings can settle acquisition of The Pullman Company stock?

Mr. Prince: That, if your Honor pleases, is a question of law. Naturally, it would be our contention that if the Commission authorized this and if the purchase of stock was the basis thereof and ran throughout the thing, then we might contend that by that authorization we have been authorized to do that, but let me make it clear that the purchase of the stock is the purchase of stock of Pullman Com-

pany and the question of the right of Pullman Company to sell that stock is before the United States Supreme Court and we think the decision of that court will govern.

We do not think Pullman would have a right to sell that stock if the Supreme Court said that it didn't."

Colloquy—Pages 63, 64 and 65—Transcript.

Mr. Bulkley: The memorandum agreement is essentially to purchase the Pullman stock, and I am trying to find out whether Mr. Place agrees with that.

The Witness: (Willard F. Place, Vice-President New York Central Railroad)

It definitely is an agreement to purchase the stock.

Q. (By Mr. Bulkley): That is the fundamental purpose of the whole thing, to form a group to purchase this?

A. That is correct.

Q. And there is no contention that the agreement can be carried out in any way except by purchase of the stock?

Mr. Aronson: Would counsel confine it to that agreement?

Exam. Hosmer: I think he is satisfied with his answer.

Mr. Bulkley: To make clear what I am driving at, these two agreements are what you are now seeking approval of in this application. I have asked you whether you contend that your application, if granted, would authorize the purchase of the Pullman stock by the buying group. I did not get a clear answer to that question.

Mr. Aronson: Well, Mr. Examiner, that is asking us what our rights are in the event that the Interstate Commerce Commission appoves the pending application. Our answer to that is obvious, isn't it?

Our rights are all the rights that the law gives us in the event that the Interstate Commerce Commission approves this application. If it approves the application, assuming that it approves it as submitted, it is approving it as submitted and whatever goes with it goes with it.

Of course, we are not going to satisfy Senator Bulkley by saying that we are going to take less than the law allows if it is approved. He can ask that question 50 times and he will get the same answer.

We are not going to limit and narrow the relief and authority that will flow by virtue of the provisions of the law if this is granted. That includes the integral part of the

purchase of the stock which is an integral part of the memorandum agreement that is before the Commission for consideration.

Mr. Bulkley: It is an integral and vital part and to make it plain, you do say that you hope as a result of this proceeding to get what you will contend is an approval of the Commission to the purchase of that stock?

Mr. Aronson: We will get everything that the law entitles us to, if the Commission approves. I think the Senator would like to argue part of his case in court here, and he can't do it over our shoulder.

Mr. Bulkley: We have a right to define the issues."

. . . . . .

APPENDIX C.

Resignations and Replacements of Pullman Incorporated Directors in Purported Compliance with Order of District Court.

Excerpts from the testimony of certain witnesses at the hearing before the Interstate Commerce Commission.

Harold R. Austin.

Q. (By Mr. Bulkley) Mr. Austin, will you please state for the record your name, address, and occupation?

A. Harold R. Austin; business address, 225 Broadway, New York City; President of the M. W. Kellogg Company.

Q. Will you state in general the business of the M. W. Kellogg Company?

A. They are developers, research designers, constructors of refining equipment for the petroleum industry, and also interested in articles of manufacture connected with the petroleum industry.

Q. Do they have any business with the railroad industry?

A. Practically none.

Q. Is the company a wholly owned subsidiary of Pullman, Inc.?

A. It is.

Q. How long has that been so?

A. Since December of 1944.

Q. How long have you been employed by them? By the M. W. Kellogg Company?

A. 43 years.

Q. It is really your life work?

A. Absolutely." (I. C. C. Tr. 237)

* * * * * * * * * *

Q. What date did you assume your duties as a Pullman director?

A. I was appointed, I believe, in December of 1945. I am not certain as to whether it was November or December, and elected in the spring of 1946.

Q. When you say "appointed" by whom do you mean?

A. I mean I was designated by the Board.

Q. You were elected by the Board, were you not?

A. By the Board, yes. By the stockholders later." (I. C. C., Tr. 239)

* * * * * * * * * *

Q. Did you have any business with Pullman, Incorporated before you were elected to the Board?

A. Only in respect to the purchase of the Kellogg Company.

Q. You were not familiar with the affairs of Pullman, Incorporated, in any close way?

A. No way whatever. (I. C. C., Tr. 239, 240)

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Mr. Austin further testified, one by one, that he had no previous acquaintance with any member of the Board of Pullman Inc., except that he had known Mr. Crawford about three months and knew very well Mr. Kellogg with whom he was asociated in the Kellogg Company. (I. C. C., Tr. 238)

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Frank R. Denton

Q. (By Mr. Bulkley) Mr. Denton, will you please state your name, address and occupation for the record?

A. Frank R. Denton, Pittsburgh, Pennsylvania; Vice Chairman Mellon National Bank and Trust Company.

Q. How long have you occupied the position of Vice Chairman?

A. Since September 23, 1946.

Q. Will you tell us what your employment was before that?

A. Prior to that time I was President of the Mellon Securities Corporation, Pittsburgh.

Q. And that position you had occupied for some years?

A. Since 1933.

Q. And you were employed by Mellon Securities even before that, were you not?

A. Since it was organized in 1930 or 1931." (I. C. C., Tr. 245)

• • • • • • • • • •

Q. You, of course, know Mr. Scaife?

A. I do.

Q. How long have you known him?

A. Since 1929.

Q. How long have you known Mr. Mellon?

A. Since 1929.

Q. What was your first conversation about accepting a position on the Board of Directors of Pullman, Incorporated?

A. My first conversation was with Mr. Scaife.

Q. Will you tell us what was said there?

A. Mr. Scaife said there was a vacancy on the Board of Pullman, Incorporated, and that he would like to propose my name for consideration by the Board, and before doing so he wanted to know from me whether it was satisfactory to me or not.

Q. Can you fix the approximate time of that conversation?

A. Perhaps March, 1946." (I. C. C., Tr. 248, 249)

• • • • • • • • • • •

Q. On that same long distance call, did you accept the proposition?

A. Yes.

Q. Were there any other conversations leading up to the election?

A. No, the next thing was Mr. Crawford got in touch with me and said that the Board would like to have my approval of the submission of my name to the stockholders at the annual meeting, which I think was in April.

Q. The conversation with Mr. Crawford was also by long distance 'phone?

A. No, by letter.

Q. Was that before your election by the Board?

A. Yes. At least I assume it was. The first I knew of it was from him. (I. C. C., Tr. 250)

• • • • • • • • • • •

Q. Do you know when you were elected by the Board?

A. No, it was in the spring, but I don't know which meeting, or the date of that meeting.

Q. What is Mr. Scaife's relationship with Mr. Mellon?

A. Brother-in-law.

Q. By way of being the husband of Mr. Mellon's sister? Is that correct?

A. Right.

Q. Are you in any way related to the Mellon family?

A. No relation.

Q. How many shares of stock do you own in Pullman, Incorporated?

A. 100." (I. C. C., Tr. 251)

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Q. Mr. Mellon is what officer of the Mellon National Bank?

A. Chairman of the Board.

Q. He is the Chief Officer, is he not?
A. Correct.
Q. And is he a director of the Pennsylvania Railroad?
A. I believe he is." (I. C. C., Tr. 252)

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Mr. Denton testified that before he was elected to the Board that he had no acquaintance at all or only casual acquaintance with any of the directors of Pullman, Inc., except Messrs. Mellon, Scaife and Drake. (I. C. C., Tr. 247-9)

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Mr. David A. Crawford, President of Pullman, Inc., testified:

A. I think he was suggested by one of the other directors. My recollection is that Colonel Drake suggested General Denton as being an experienced financial man, living in a community from which we drew a lot of business. We have our largest single plant right in Pittsburgh, right in the outskirts of the town, and it seemed to be an entirely acceptable arrangement.

I might say there had, historically, been three Pittsburgh directors on our Board for 15 years. Ever since we acquired the old Standard Steel Car Company, and when Mr. Mellon, who was one of them, retired, it was a perfectly normal and natural procedure to look about in that community and in that group to replace him. General Denton was a very outstanding candidate." (I. C. C., Tr. 392)

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Mr. Forney Johnston.

Q. (By Mr. Bulkley) Mr. Crawford, will you please state your name, address and occupation for the record?
A. My name is David A. Crawford. My business address is in the Pullman Building, Chicago. I am President of Pullman, Incorporated, and of the Pullman Company. (I. C. C., Tr. 375)

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Q. I would like to get in the record the principal occupations of the several directors of Pullman Incorporated. (I. C. C., Tr. 375)

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Q. Mr. J. Frank Drake?
A. He is the President of Gulf Oil Corporation.
Q. Mr. Forney Johnston?

A. He is a lawyer in active practice at Birmingham, Alabama. He has done a good deal of legal work there for the Pullman Standard, who have a plant there.

Q. He is the regular local counsel for Pullman Standard?

A. I think to the extent that they need them there, yes, sir. (I. C. C., Tr. 376)

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Q. What was said on behalf of the election of Mr. Johnston to the Board?

A. I think I gave you that.

Mr. Aronson: He gave you that.

Q. (By Mr. Bulkley) I am a little confused about that.

A. He was the man who had been connected as a lawyer with the operations of Pullman Standard down there at Birmingham.

Q. But who suggested that he be elected to the Board?

A. I think I did.

Q. And—

A. You see, I went down there and bought that plant, and turned it over to Pullman Standard to operate, and I had quite a little dealing with Mr. Johnston while doing that, and I knew that he was an active businessman, a leading lawyer of the town, and a very capable corporation official, and I recommended him quite strongly for membership on the Pullman, Incorporated Board, because we had one of our lightest and most important car-building plants in that town.

Q. You had known him personally from the first acquisition of the plant?

A. I had known him many years before that, even.

Q. About when was that plant acquired?

A. Along in the '20's, the late '20's. (I. C. C., Tr. 390, 391)

Pullman Board.

Q. (By Mr. Haddock) Mr. Lane, will you please state your name and company with which you are connected?

A. John F. Lane, Secretary and Treasurer, Pullman, Inc., since 1927, the date of the organization of the company.

Q. Have you any connection with Pullman—you said Pullman, Inc.?

A. Yes, sir.

Q. Do you have any connection with The Pullman Company?

A. I am also Secretary of The Pullman Company, which is a subsidiary of Pullman, Inc." (I. C. C., Tr. 433)

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Q. Can you turn to Exhibit No. 36, the list of the directors of Pullman, Inc., and state which of the names appearing thereon are people who are employees of Pullman, Inc., or Pullman Company.

A. Champ P. Carry, president, Pullman Standard Car Manufacturing Company. David A. Crawford, president, Pullman, Inc., the Pullman Company. John F. Lane, secretary, Pullman, Inc., and the Pullman Company. Louis S. Taylor, vice president, finance, Pullman, Inc., and the Pullman Company.

Q. On Exhibit No. 36, it is noted that Morris W. Kellogg is a director. Mr. Kellogg is an officer of M. W. Kellogg Company?

A. Yes, I am sorry, I skipped him. Morris W. Kellogg is chairman of the board of directors of the M. W. Kellogg Company, a subsidiary of Pullman, Inc.

Q. Are there any others on this list who are connected with the M. W. Kellogg Company?

A. Among the new directors elected in place of the above-mentioned resignations, Mr. Harold R. Austin is president of the M. W. Kellogg Company, a subsidiary of Pullman, Inc. (I. C. C., Tr. 442)

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Q. (By Mr. Bulkley) Mr. Lane, did you say that you have been secretary of Pullman, Inc., ever since its incorporation?

A. Yes, sir, 1927.

Q. Is the number of directors of Pullman, Inc., fixed by the charter, or is there some flexibility so that the board can increase or reduce its own number?

A. The charter provides that the number of directors shall be stipulated as in the bylaws, and that is so provided in the bylaws of the company.

Q. And is there some flexibility about that, so that the board may be increased or reduced from time to time?

A. Yes, sir.

Q. And what are the limits?

A. No limits stated." (I. C. C., Tr. 453)

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Q. Are you familiar with the resignations that occurred last autumn?

A. Pullman, Inc., Board you are speaking of?

Q. Yes.

A. Yes.

Q. Who resigned?

A. Pullman, Inc. Mr. Richard K. Mellon resigned December 19, 1945. I shall have to correct myself there, and state that I don't remember the date that the number of board members was reduced from 16 to 15. I had not made a record of that.

Mr. Henry S. Sturgis resigned November 27, 1945.

Mr. Harold S. Vanderbilt resigned November 23, 1945.

Mr. George Whitney resigned November 23, 1945.

That sums up to four resignations.

Q. That is what I understood. Now, the proxy statement shows that three of those vacancies were filled. Is that correct?

A. Yes, sir.

Q. What happened to the other directors?

A. The bylaws were changed to provide for a reduction from 16 to 15. I just don't happen to have the date of that bylaw amendment.

Q. I think the date may have some significance. You are the secretary of the company. I would like to find out.

A. Just one moment, sir. Section 1, article 3, of the bylaws of Pullman, Inc., providing for the number of directors, was amended at the meeting of March 20, 1946.

Q. Will you state the amendment, please?

A. I haven't the amendment here, sir.

Q. But the effect of it—

A. I will see if I have the minutes of that meeting here. Just one moment.

At the meeting of the board of directors of Pullman, Inc., on March 20, 1946, upon motion duly made, seconded, and unanimously carried, it was resolved that section 1, article 3, of the bylaws be amended by striking out the word "16" and inserting the word "15" in lieu thereof, so that the said paragraph shall provide for the number of 15 directors. March 20, 1946. (I. C. C., Tr. 456-8)

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Excerpts from Pullman Incorporated Proxy Statement for 1946 Annual Stockholders' Meeting, I. C. C. Docket No. 29592, Exhibit 49.

Mr. Harold R. Austin has not heretofore been elected a Director by the Stockholders of the Corporation. He was elected a Director by the Board on March 20, 1946, to fill the vacancy caused by the resignation of Mr. Harold S. Vanderbilt. Mr. Austin is now, and has been since February 13, 1943, Executive Vice President of The M. W. Kellogg Company, Jersey City, N. J., of which the entire outstanding capital stock is owned by Pullman Incorporated. Prior to his election as Executive Vice President, Mr. Austin served as Assistant to the President of The M. W. Kellogg Company since January, 1938.

Mr. Frank R. Denton has not heretofore been elected a Director by the Stockholders of the Corporation. He was elected a Director by the Board on March 20, 1946, to fill the vacancy caused by the resignation of Mr. Richard K. Mellon. Mr. Denton is now, and has been since 1933, President and Director of the Mellon Securities Corporation of Pittsburgh, Pa., but was on leave of absence for approximately three years while serving in the U. S. Army. Mr. Denton is also Director and Vice President of Melbank Corporation, Pittsburgh, Pa., and Director of the Shamrock Oil and Gas Corporation, Amarillo, Texas, and of the Pittsburgh & West Virginia Railway Company, Pittsburgh, Pa.

Mr. Forney Johnston has not heretofore been elected a Director by the Stockholders of the Corporation. He was elected a Director by the Board on March 20, 1946, to fill the vacancy caused by the resignation of Mr. Henry S. Sturgis. Mr. Johnston has been a Senior Partner of the firm of Cabaniss & Johnston, Attorneys, Birmingham, Alabama, for more than five years, and has served as Director and General Counsel of the First National Bank, Birmingham, Alabama, since 1931.

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The following information for the fiscal year 1945, is supplied as to each person who acted as a Director of the Corporation, as to each person nominated for election as a Director of the Corporation, and as to the two Officers of

the Corporation not on the Board who received remuneration totaling more than $20,000 during such year:

Name	Aggregate Amount of Remuneration From Corporation and Its Subsidiaries
Harold R. Austin	$66,160.00
Champ Carry	50,750.00
David A. Crawford	81,400.00
Morris W. Kellogg	67,050.00
John F. Lane	16,150.00
Louis S. Taylor	48,900.00

The above are the six full time employees now serving on the Board.

Summary Showing Effect of Court's Order.

The effect on the Pullman Incorporated Board of Directors of the resignations required by the District Court, as shown by the statements above quoted, is indicated in the following table:

	Mellon Associates	Full time Employees	Others	Total
Board prior to Philadelphia hearing	3	5	8	16
Resignations	1	0	3	
	2	5	5	
Replacements	1	1	1*	
Present board	3	6	6*	15

*Includes Forney Johnston, local legal representative of Pullman interests at Birmingham for many years.

As the Mellon group is shown by the record to be the largest stockholding interest in Pullman Incorporated, it could reasonably count on the cooperation of the full time company employees. Before the Philadelphia court order the combined Mellon associates and full time employees were 8 out of a board of 16. After compliance with the order which the District Court thought would end interlocking control, the combined Mellon associates and full time employees are 9 out of a total of 15 and one of the other six is an attorney long employed by the Company.